RECORD AND BRIEFS

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No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell; and ROBERT M. NELSON,

Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not "at home" in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Figueroa v. BNSF Ry. Co.*, 361 Or. 142 (2017); *Bristol-Myers Squibb Co. v. Superior Court of California*, No. 16-466 (U.S. Sup. Ct., dec. pending).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning due-process constraints on the judiciary's exercise of personal jurisdiction. *See, e.g.,* Mark Moller, *Contra Plaintiffs' Bar, Registering to Do Business Does Not Create General Jurisdiction*, WLF Legal Opinion Letter (June 10, 2016); Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF Legal Opinion Letter (Apr. 1, 2016); James M. Beck,

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief, and blanket letters of consent have been lodged with the Clerk.

Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after Daimler AG v. Bauman, WLF Working Paper (Nov. 2015).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

This Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), made clear that state and federal courts lack personal jurisdiction over a corporate defendant unless (1) that defendant's activities within the forum state give rise to the claims being asserted or (2) the corporation is "at home" in the forum state. In sharply curtailing its prior "continuous, substantial, and systematic" rationale for general personal jurisdiction, *Daimler* clarified that a corporation, even one that conducts significant business in all 50 states, can be deemed "at home" in no more than one or two states: its state of incorporation and its principal place of business (or its surrogate principal place of business).

Amici favor strict adherence to *Daimler*'s due-process limitations on the judiciary's exercise of personal jurisdiction over out-of-state defendants. *Amici* are concerned that the statutory rationale for personal jurisdiction adopted by the Montana Supreme Court—if not rejected by this Court—will erode the due-process rights of defendants and render *Daimler* a dead letter in all cases brought

under the Federal Employers' Liability Act. *Amici* thus urge the Court to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases. Such clarity is needed to provide companies that have a multi-state presence some minimal assurance as to where their conduct will render them liable to suit.

STATEMENT OF THE CASE

BNSF Railway Company (BNSF) is a leading freight railway carrier in the United States. Incorporated in Delaware, BNSF's principal place of business is Ft. Worth, Texas. *See* Pet. App. 3a. Although BNSF operates in 28 states, including Montana, *none* of BNSF's corporate offices or departments is located in Montana. *Id.* at 63a.

Respondents Kelli Tyrrell and Robert Nelson—neither of whom are residents of Montana—brought separate suits against BNSF in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, alleging that BNSF's negligence caused them to sustain injuries while working for BNSF. Pet. App. 1a-4a. Respondents do not allege that they ever lived or worked in Montana; nor do they allege that they suffered any injury in Montana. *Ibid.*

Given respondents' bare jurisdictional allegations, BNSF moved to dismiss each suit on the basis that Montana state courts cannot exercise general jurisdiction over it consistent with the due-process constraints this Court recognized in *Daimler*. The trial court in *Tyrrell* denied BNSF's motion and

certified its ruling as final, allowing BNSF to seek discretionary appeal. Pet. App. 41a-46a, 47a-73a. In *Nelson*, the trial court granted BNSF's motion to dismiss, and the plaintiff appealed from that ruling as of right. *Id.* at 36a-40a. The Montana Supreme Court accepted BNSF's appeal in *Tyrrell*, which it then consolidated with *Nelson*. *Id.* at 34a-35a.

A divided Montana Supreme Court "decline[d]" to apply *Daimler*, which it dismissively viewed as "factually and legally distinguishable." Pet. App. 15a. Because *Daimler* was "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," the court deemed it inapplicable here, where "all the parties involved are citizens of the United States." Pet. App. 11a. Most significantly for the court, *Daimler* "did not involve a railroad claim or a railroad defendant." *Ibid.*

Invoking FELA's venue provision, 45 U.S.C. § 56—which establishes venue for FELA cases filed "in a district court of the United States" and provides state courts with "concurrent jurisdiction" over such claims—the Montana Supreme Court cited cases purportedly showing that *this* Court "consistently has interpreted [§] 56 to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." Pet. App. 8a, 12a-13a. Because *Daimler* "did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business,'" *id.* at 12a, the court concluded that the Montana courts' exercise of

personal jurisdiction fully "comports with the due process clause." *Id.* at 17a-18a.

Justice McKinnon dissented at length. Pet. App. 20a-30a. Criticizing the majority for improperly circumventing this Court's holding in *Daimler*, she pointed out that this Court's FELA precedents relied on by the majority "do not so much as mention the Due Process Clause or general jurisdiction." *Id.* at 27a. She went on to explain that § 56 of FELA "is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." *Id.* at 29a. Regardless of FELA, Justice McKinnon concluded that "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." *Id.* at 31a.

SUMMARY OF ARGUMENT

Among the bedrock freedoms protected by the Due Process Clause is the freedom not to be haled into court indiscriminately. This case arises from injuries respondents allegedly sustained outside of Montana while working for BNSF—a railway company incorporated in Delaware and headquartered in Texas. None of the events giving rise to respondents' claims occurred in Montana, and no party in this case is a citizen or resident of Montana. Nonetheless, the Montana Supreme Court held that BNSF can be sued in Montana by nonresident plaintiffs for claims that have no connection whatsoever to Montana.

The Montana Supreme Court's holding in this case simply cannot be squared with the due-process

limitations on personal jurisdiction this Court recognized in *Daimler AG v. Bauman*. Consistent with those limits, Montana courts may exercise general jurisdiction over BNSF only if the defendant's contacts with Montana are so extensive as to render it "at home" there. In this case, BNSF is clearly not at home in Montana, and because the plaintiffs' claims have no connection whatsoever to Montana, no other basis for personal jurisdiction exists. Under nearly identical facts, both the Oregon and Missouri Supreme Courts recently held that due process simply does not allow state courts to exercise general jurisdiction over nonresident defendant railway companies. *See Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, 117 (2017); *State ex rel. Norfolk Southern Ry. Co. v. Dolan*, No. SC95514, slip op. at 8 (Mo. Feb. 28, 2017).

FELA makes no difference. Under the Supremacy Clause, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse Montana courts from their duty to accord due process of law to every defendant haled before them. Contrary to the Montana Supreme Court, FELA's venue provision, 45 U.S.C. § 56, offers no independent basis for personal jurisdiction over BNSF. Because personal jurisdiction and proper venue are wholly distinct requirements, federal statutes such as FELA, which merely delineate a number of potential venues, assume *nothing* about the existence of personal jurisdiction in any given case. While FELA provides for concurrent subject-matter jurisdiction of *claims* for state and federal courts, it neither alters nor expands the authority of state courts to exercise personal jurisdiction over *persons*.

Nor *could* FELA expand the personal jurisdiction of the state courts, as Justice McKinnon properly noted in her dissent. Whatever the extent of Congress's authority to expand the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. This Court has made clear that the Constitution imposes unique *territorial* constraints on the exercise of personal jurisdiction by state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. As a result, FELA cannot abrogate the sovereignty of the states, nor may Congress alter the Constitution's deliberate framework of horizontal federalism.

Unless reversed, the Montana Supreme Court's erroneous holding will enable FELA plaintiffs, like those here, to shop their claims to forums with no connection to those claims. Such forum shopping distorts the civil justice system by creating inefficiencies when cases are litigated far from the location of the parties, the alleged tortious conduct, and the evidence—all while subjecting defendants to the cost and inconvenience of having to litigate in a distant location. By permitting plaintiffs whose suits have no relationship to Montana to subject a nonresident defendant to suit there, the decision below rewards improper forum shopping and invites further abuse.

ARGUMENT

I. FELA Does Not Supplant Bedrock Due-Process Limitations on State Courts' Exercise of Personal Jurisdiction

The decision below interprets federal law as permitting nonresident defendants to be haled into state court to answer FELA claims that have no connection whatsoever to the forum state. But the Due Process Clause bars the exercise of jurisdiction over nonconsenting, out-of-state defendants unless the suit is brought to enforce "obligations [that] arise out of or are connected with the [defendant's] activities within the state." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *see J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 881 (2011) (plurality op.) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.").

This Court has consistently held that a state court may not exercise personal jurisdiction over an out-of-state defendant simply because that defendant has engaged in "continuous" or "systematic" activities within the state. Rather, due process requires a showing that the defendant's in-state activities are sufficiently connected to the lawsuit. *See, e.g., Daimler*, 134 S. Ct at 757 ("[A] corporation's 'continuous activity of some sorts within a state is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'") (quoting *Int'l Shoe*, 326 U.S. at 318); *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977) (explaining that "the central concern of the inquiry

into personal jurisdiction" is "the relationship among the defendant, the forum, and *the litigation*") (emphasis added).

A defendant is generally required to answer any and all claims asserted in its "home" jurisdiction, even if the claim bears no relationship to the defendant's contacts in that jurisdiction. *Daimler* made plain, however, that exercising such "general jurisdiction" over a corporation can be sustained in only two places: the state in which a corporation maintains its principal place of business and the state of incorporation. 134 S. Ct. at 760. As *Daimler* clarified, personal jurisdiction may not be exercised over nonresident defendants based on claims "having nothing to do with anything that occurred or had its principal impact in" the forum state. *Daimler*, 134 S. Ct. at 762. Indeed, this Court explicitly rejected the *Daimler* plaintiffs' request that it approve "the exercise of general jurisdiction in every State in which a corporation 'engages in a substantial, continuous, and systematic course of business,'" characterizing the plaintiffs' formulation as "unacceptably grasping." *Id.* at 761 (citations omitted).

Here it is undisputed that BNSF is not "at home" in Montana. Petitioner is not incorporated in Montana, nor does it maintain its principal place of business there. Thus, for a Montana court to properly exercise personal jurisdiction over BNSF to adjudicate the plaintiffs' claims, it may do so only on the basis of "specific jurisdiction"—that is, a showing that each claim "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Id.* at 754 (internal quotations omitted). The plaintiffs in this

case do not even purport to satisfy that requirement. And where, as here, specific jurisdiction over a corporate defendant is lacking, general jurisdiction may be exercised only if the corporation's contacts with Montana are so extensive as to render it "at home" there.

Before any court can assert personal jurisdiction over a defendant in a federal question case, that court must first determine whether the exercise of jurisdiction "comports with the limits imposed by federal due process." *Daimler*, 134 S. Ct. at 753. The Montana Supreme Court's decision thus expands the scope of general personal jurisdiction well beyond its constitutional bounds. By authorizing out-of-state defendants to be sued in a forum without regard to whether they are "at home" there—even though the plaintiff's claims bear *no* relationship to that forum—the decision below erodes the vital due-process limitations on personal jurisdiction this Court recognized in *Daimler*.

Simply put, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse state courts from their duty to accord defendants appearing before them with due process of law. *See* U.S. Const. amend. XIV, § 1. Those constraints impose firm limits on the authority of courts to exercise jurisdiction over claims and defendants that lack a sufficient connection to the forum:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State

> has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

That the plaintiffs' claims in this case are brought under FELA makes no difference. Even if FELA explicitly provided for personal jurisdiction in this case—and it obviously does not—that would not sweep aside the constitutional limits imposed by due process. Like all federal statutes, FELA is "subject to the requirements of * * * the Due Process Clause," *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), and Congress has "no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

Indeed, serious constitutional concerns would arise if this court were to interpret FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case. To avoid any entanglement with those questions, the Court should interpret FELA as consistent with the bright-line rule announced in *Daimler*: state courts lack general personal jurisdiction over a corporate defendant unless that defendant is "at home" in the forum state.

II. FELA Does Not Expand the Personal Jurisdiction of Montana State Courts, Nor Could It

The Montana Supreme Court held that "state courts [may] hear cases brought under the FELA even where the only basis for [personal] jurisdiction is the railroad doing business in the forum state." Pet. App. 8a, 12a-13a. That holding is contrary to the plain language of FELA and this Court's own precedents interpreting it. And even if Congress desired—under FELA, or otherwise—to extend the *in personam* jurisdictional reach of state courts to defendants who are not "at home" in the forum state, it could not permissibly do so.

A. FELA Does Not Purport to Alter or Expand the Personal Jurisdiction of State Courts

In enacting FELA, Congress clearly did not extend the bounds of state courts' general personal jurisdiction over nonresident defendants. Section 56 of FELA provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 56. To the extent that § 56 delineates possible venues for a FELA action, that delineation has *nothing* whatsoever to do with personal jurisdiction. *See, e.g., Barrett*, 361 Or. at 129 ("Nothing in section 56 purports to confer personal jurisdiction over out-of-state corporate defendants in state or federal courts."); *State ex rel. Norfolk Southern*, No. SC95514, slip op. at 3 (holding that FELA "does not provide an independent ground for jurisdiction in FELA cases in state courts that do not otherwise have personal jurisdiction over the defendant").

As a preliminary matter, statutory limits on venue should not be mistakenly conflated with constitutional limits on personal jurisdiction. Venue assesses whether litigation in a particular geographic location is convenient, whereas personal jurisdiction considers whether a particular governmental body's courts can compel the defendant to appear. Accordingly, "the question of whether venue within the state's borders would be burdensome is analytically distinct from the question of which governments can compel a defendant to appear within those borders." Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After* Walden v. Fiore, 19 Lewis & Clark L. Rev. 769, 780 (2015).

As this Court has carefully explained, "[t]he question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180

(1979); *see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("The question [for personal jurisdiction] is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant."). Because personal jurisdiction and proper venue are wholly distinct requirements, the fact that Congress altered venue does not show that it altered personal jurisdiction. Accordingly, a statute like FELA that merely delineates a number of potential venues assumes *nothing* about whether personal jurisdiction exists over any given defendant. Rather, such jurisdictional determinations must be made, as always, on a case-by-case basis.

Moreover, under any plausible reading of FELA, the simple fact that this case is pending in *state* court, rather than *federal* court, is entirely dispositive of the question presented here. On its face, § 56's authorization to bring an action wherever a defendant is "doing business" applies only "in a district court of the United States," not any court located *within* the United States. Indeed, "[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *Nicastro*, 564 U.S. at 884 (plurality op.).

In other words, federal venue statutes reflect Congress's intent "that venue should always lie in *some federal court* whenever *federal courts* have personal jurisdiction over the defendant." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 578 (2013) (emphases added). And the fact that "[f]ederal courts ordinarily follow *state* law in determining the bounds of their

jurisdiction over persons," *Daimler*, 134 S. Ct. at 753 (emphasis added), further undermines any contention that § 56 provides an independent basis for a Montana court to exercise personal jurisdiction over BNSF in this case. At bottom, nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts.

Nor does § 56's perfunctory granting of "concurrent jurisdiction" over FELA claims to the "courts of the several States" alter the personal jurisdiction analysis in any way. The concept of "concurrent jurisdiction" extends to *claims*, not *persons*, and has always been understood to refer to subject-matter jurisdiction, *not* personal jurisdiction. *See, e.g., Haywood v. Drown*, 556 U.S. 729, 747 (2009) ("[T]he state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally *over the subject matter*.") (quoting 1 James Kent, *Commentaries on American Law* 374-75 (1826)) (emphasis added); *Growe v. Emison*, 507 U.S. 25, 32 (1993) (noting that "federal courts and state courts often find themselves exercising concurrent jurisdiction *over the same subject matter*") (emphasis added).

Stated differently, "concurrent jurisdiction" simply grants state courts the "authority" to "adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). For that reason, courts have interpreted § 56's grant of "concurrent jurisdiction" to the states as a grant of subject-matter jurisdiction over FELA *claims*—not a grant of all-purpose personal jurisdiction over out-of-state *defendants*. *See In re CSX Transp., Inc.*, 151 F.3d 164, 166 (4th Cir. 1998)

(explaining that § 56 "confers concurrent federal and state jurisdiction over FELA *claims*") (emphasis added).

This Court has stated explicitly that § 56 is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). Rather, in granting "concurrent jurisdiction" over FELA claims to the state courts, Congress sought to debunk any notion that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Ibid*; *see Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387 (1929) ("As to the grant of jurisdiction in [FELA], that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned.").

Thus, § 56 grants subject-matter jurisdiction over FELA claims to the state courts, but only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers*, 223 U.S. at 55.

B. FELA Cannot Be Construed as Extending the Reach of State Courts' Personal Jurisdiction

Whatever the extent of Congress's authority to establish the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. This distinction is significant because the "first principle" of the

Constitution is that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *The Federalist* No. 45 (James Madison)).

As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid.* The federal government is not granted "an indefinite supremacy over all persons and things," *The Federalist* No. 39 (James Madison), nor does the Constitution "confer upon Congress the ability to require the States to *govern* according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (emphasis added).

"Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts." Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1, 19 (2014). Indeed, as Justice Frankfurter explained:

> Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that [apply] for every other litigant who seeks access to its courts.
>
> * * * * *
>
> The federal law in any field within which Congress is empowered to

> legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but *not* in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress.

Brown v. Gerdes, 321 U.S. 178, 190, 193 (1944) (Frankfurter, J., concurring) (emphasis added).

Although the Constitution imposes only due-process limitations on the exercise of personal jurisdiction by *federal* courts, it imposes both due-process *and* territorial limitations on the exercise of personal jurisdiction by *state* courts. *See, e.g.*, Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 16 (2006) ("Despite the due process focus, the U.S. Supreme Court has never wholly discarded taking sovereignty concerns into account in its personal jurisdiction analysis."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589, 1591 (1992) ("It is now reasonably clear that the source [of constitutional limitations on state court jurisdiction] is not just the Due Process Clause."). Those limitations serve both to protect litigants from inconvenient or distant litigation and to recognize limits on the sovereignty of each state with respect to affairs arising in other states.

Indeed, this Court has made clear that the

Constitution imposes unique *territorial* constraints on the exercise of personal jurisdiction by state courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. Personal jurisdiction also "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292-93 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

As this Court has explained time and again, these principles of interstate federalism "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). So "when it comes to *federal legislative* power concerning *state judicial* power, state boundaries have constitutional significance." Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1119 (1993) (emphases in original).

While due process constrains the authority of both federal and state courts to reach across geographic borders to exercise personal jurisdiction over parties and controversies arising outside their borders, the geographic boundaries of the United States are vastly larger than those of any one state. *See Nicastro*, 564 U.S. at 884 (plurality op.) ("For [personal] jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any

individual state."). And yet, "[r]egardless of who is doing the legislating, the relevant boundaries are those of the sovereign that has created the court." Steinman, *supra*, at 1119.

So even if Congress wanted to expand the general personal jurisdiction of state courts to reach FELA defendants who are not "at home" in the forum state, it could not do so. Likewise, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism. As a plurality of this Court has cautioned, allowing the wrong state to exercise jurisdiction over the citizens of another state "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *Nicastro*, 564 U.S. at 884 (plurality op.).

In sum, because § 56 of FELA does not authorize state courts to exercise general jurisdiction over nonresident defendants—nor could it—the judgment below should be reversed.

III. THE MONTANA SUPREME COURT'S DECISION DEPRIVES CORPORATE DEFENDANTS OF THE VERY PREDICTABILITY THAT *DAIMLER* PROVIDED THEM

Authorizing a state court to exercise general jurisdiction over every railway company "doing business" in the state would not only violate the Due Process Clause and disregard the sovereignty of the states, it would also destroy the very predictability that *Daimler* sought to provide by ensuring that companies are able to structure their affairs with

some confidence of not being haled into distant courts unexpectedly.

Among other things, due-process limitations on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Such "[p]redictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

This Court's bright-line rule in *Daimler* provides corporations with the necessary assurance that they will be subject to general jurisdiction in only one or two well-defined jurisdictions. A company's state of incorporation and principal place of business—the two jurisdictions where a corporation is always "at home" under *Daimler*—"have the virtue of being unique to the defendant." *Daimler*, 134 S. Ct. at 760. That is, "each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Ibid.*

In contrast, most railway companies are "doing business" in any number of states. By permitting those activities to suffice for general jurisdiction, the rule adopted below would allow railway carriers to be sued in any state they touch by *any* plaintiff on *any* FELA claim arising *anywhere*. Railway companies would be completely unable to predict where any particular claim might be brought. Such unprecedented expansion of states'

personal jurisdiction over nonresident defendants would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp.*, 471 U.S. at 472).

Because it precludes companies with a multi-state presence from structuring their affairs with some minimal assurance as to where they will be subject to suit, the decision below wholly undermines the very predictability *Daimler* provided and should be reversed.

IV. THE MONTANA SUPREME COURT'S DECISION FURTHER INCENTIVIZES IMPROPER FORUM SHOPPING

As this Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—*not* the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis added). At the same time, permitting a nonresident plaintiff whose claims have no relationship to the forum state to compel an out-of-state defendant to defend suit there rewards improper forum shopping and invites further abuse. Given the forum-shopping implications of the Montana Supreme Court's holding, it is all the more urgent that this Court reverse the judgment below to ensure that merely invoking FELA will not permit a plaintiff to circumvent the "at home" rule this Court announced in *Daimler*.

No matter their reasons, if the nonresident

plaintiffs in this case found it strategically advantageous to bring their FELA claims in Montana courts, other nonresident plaintiffs contemplating FELA suits will too. Indeed, there are dozens of FELA cases pending against BNSF in Montana state courts alone, all brought by nonresident plaintiffs alleging *no* Montana-related injuries, acts, or omissions. *See* Br. for Pet'r at 13 n.1 (Feb. 27, 2017). If upheld, the Montana Supreme Court's elastic approach to general jurisdiction will simply encourage more nonresident plaintiffs from across the country to pursue the same forum-shopping strategy.

Nor was Montana alone in this regard. In a recent decision, the Oregon Supreme Court considered jurisdictional arguments by a nonresident FELA plaintiff who sued BNSF in Oregon for alleged injuries that took place in Washington. *See Figueroa*, 361 Or. at 144. In that case, the plaintiff candidly admitted that she chose Oregon for her convenience and to avoid litigating the case in Washington, where interrogatories and expert discovery are allowed. Such gamesmanship should be discouraged, not rewarded, and the *Figueroa* plaintiff's strikingly candid admission that she filed suit in Oregon to evade Washington's discovery rules only reinforces that this Court should disincentivize future FELA plaintiffs throughout the country from engaging in similar behavior. Although the Oregon Supreme Court rejected Figueroa's jurisdictional arguments, other states might well follow Montana's lead if the decision below is not

reversed.[2]

Such forum shopping serves no useful purpose and is deeply unfair to litigants. This Court has long recognized that "it would be unfair for the character [or] result of a litigation materially to differ because the suit had been brought in" a particular forum. *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). Yet empirical research confirms that forum shopping can affect the outcome of cases because the venue in which a case proceeds very often impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1507 (1995) (analyzing three million cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases"—an effect that "prevails over the range of substantively different types of cases").

Forum shopping also erodes the integrity of the civil justice system. Indeed, "[f]orum shopping conjures negative images of a manipulable legal system in which justice is not imparted fairly or predictably." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C.L. Rev. 889, 892 (2001). For example, allowing plaintiffs to have their suits tried

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[2] According to the Association of American Railroads, which filed an *amicus* brief in support of *certiorari*, there are at least 170 cases pending in state courts nationwide in which plaintiffs have asserted FELA claims in jurisdictions where the defendant railroad company is not "at home" and yet the FELA claim did *not* arise in the forum state. *See* Br. of Ass'n of Am. Railroads as *Amicus Curiae*, at 9 (Oct. 28, 2016).

and decided in more favorable but far-flung forums can facilitate "magnet jurisdictions." Such jurisdictions impose unwelcome administrative burdens on the courts and undermine local interests in procuring justice. As this Court has noted:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). Forum shopping thus undermines the legal system "by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1445 (2010).

Despite the Montana Supreme Court's admonition that "FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes," Pet. App. 5a, no injustice against railroad

employees results from enforcing bright-line jurisdictional rules. Even under *Daimler*, for example, each plaintiff in this case would still have at least *three* viable forums within which to bring his or her claims: the state where the injury was allegedly sustained, Delaware, and Texas. While applying the rule announced in *Daimler* may limit the number of state forums in which FELA plaintiffs may bring their claims, it does nothing to undermine the "humanitarian and remedial purposes" of FELA.

At bottom, if plaintiffs are allowed unfettered discretion to sue corporations anywhere the defendant arguably is "doing business," then plaintiffs' counsel will be perfectly free to shop claims to whichever forum they view as most plaintiff-friendly. These troubling forum-shopping incentives provide the Court with yet another reason to reject the Montana Supreme Court's sweeping and unworkable theory of personal jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment of the Montana Supreme Court should be reversed.

Respectfully submitted,

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